Supreme Court, U. S.
FILED
APR 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1438

MARSHALL G. VANCE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petition for Writ of Certiorari and Appendix in Support Thereof

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N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

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SUPREME COURT OF THE UNITED STATES

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NO.

MARSHALL G. VANCE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

This is a Petition for Writ of Certiorari to review a judgment of the Superior Court of New Jersey, Appellate Division entered on November 18, 1975. The judgment affirmed petitioner's conviction by the Cape May County Court, after a trial *de novo* on the record in the municipal court,[1] of driving an automobile while under the influence of alcohol in violation of *N.J.S.A.* 39:4-50(a) and of passing on a curve, contrary to *N.J.S.A.* 39:4-86, and further affirming the denial by the county court of petitioner's motion for a jury trial. Since petitioner was a second offender under *N.J.S.A.* 39:4-50(a) the county court had imposed a mandatory sentence of three months in the county jail and revocation of driving privileges in the State of New Jersey for ten years.[2]

On December 17, 1975 petitioner filed in the New Jersey Supreme Court a petition for certification to the Superior Court of New Jersey, Appellate Division. In an order dated March 2, 1976 the petition for certification was denied.

1. *See, State v. Hanson*, 59 N.J. Super. 434, 444 (App. Div. 1960); *R.* 3:23-8, *New Jersey Court Rules; N.J.S.A.* 2A:3-6.

2. A fine of $10.00, together with costs of proceedings was imposed for the violation of *N.J.S.A.* 39:4-86.

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OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division has not been reported and appears in the appendix herein as Addendum "A". The order of the New Jersey Supreme Court denying the petition for certification has not yet been reported and appears in the appendix herein as Addendum "B".

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JURISDICTION

The jurisdiction of this Court in invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Superior Court of New Jersey, Appellate Division was entered on November 18, 1975. On March 2, 1976 the Supreme Court of New Jersey denied petitioner's petition for certification. The present petition for writ of certiorari followed.

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QUESTION PRESENTED

1. Is a defendant accused under New Jersey law of being a second drinking-driving offender, an offense punishable by a mandatory sentence of three months in the county jail and suspension of driving privileges for ten years, entitled under the Sixth and Fourteenth Amendments to a jury trial?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article III, Sec. 2, Clause 3:

> "The Trial of All Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

Constitution of the United States, Amendment XIV:

> " • • • No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.J.S.A. 39:4-50(a):

> Operating under influence of liquor or drugs; penalty; forfeiture of right to operate
>
> (a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control, shall be subject, for the first offense, to a fine of not less than $200.00 nor more than $500.00, or imprisonment for a term of not less than 30 days nor more than 3 months or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways

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of this State for a period of 2 years from the date of his conviction or until he reaches the age of 21 years, whichever is the greater period of time, in the case of a person who at the time of his conviction is under the age of 21 years. Except as hereinafter provided, for a subsequent violation, he shall be imprisoned for a term of 3 months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of 10 years from the date of his conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director. A magistrate who imposes a term of imprisonment under this section may sentence the person so convicted either to the county jail or to the workhouse of the county wherein the offense was committed.

A person who has been convicted of a previous violation of this section need not be charged as a second offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second offender, but if the second offense occurs 10 or more years after the previous conviction the court may, in its discretion, suspend the sentence of imprisonment, impose a fine of not less than $300.00 nor more than $1,000.00 and place the person on probation.

N.J.S.A. 2A:3-6:

Jurisdiction of appeals from inferior criminal courts

The county court of each county shall have jurisdiction to hear, determine and review any judgment in any cause, other than a civil cause, in the county district court or county traffic court of the county or in any municipal court, park police court or other inferior court of limited criminal jurisdiction in the county, except a criminal judicial district court, unless

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the judge of the court is also the county judge, in which case the law division of the superior court shall have jurisdiction to hear, determine and review the same.

N.J.S.A. 2A:8-21(a):

Jurisdiction of specified offenses

Each municipal court, and the magistrate or magistrates thereof, shall have jurisdiction of the following offenses occurring within the territorial jurisdiction of the court:

a. Violations of the motor vehicle and traffic laws;

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STATEMENT OF THE CASE

On December 21, 1973 defendant was charged with a violation of *N.J.S.A.* 39:4-50(a), driving while under the influence of alcohol, and *N.J.S.A.* 39:4-86, passing on a curve. The hearing on the matter was held in the Municipal Court for the Township of Lower, in Cape May County, New Jersey, on May 11, 1974 before the Honorable Francis Dwyer, a lay magistrate.[3] The hearing resulted in a conviction for driving while under the influence of alcohol and passing on a curve. With respect to the charge of driving while under the influence of alcohol, petitioner was sentenced as a second offender within the meaning of the New Jersey drinking-driving law to the minimum mandatory revocation of his driving privileges in the State of New Jersey for ten years, and incarceration in the Cape May County jail for a period of three months. *See, N.J.S.A.* 39:4-50(a).[4]

Thereafter, pursuant to statute,[5] petitioner filed a notice of appeal from the judgment of the Lower Township, Municipal Court in Cape May County Court. At the same time, he filed a motion demanding a jury trial.[6]

On December 17, 1974 petitioner's motion for trial by jury was argued and denied by the Cape May County Court. On that same date, a trial *de novo* on transcript was held. On December 26, 1974 the county court, in a letter opinion, affirmed the conviction of the defendant on both charges and reimposed the penalties set by the municipal court.

Petitioner filed a notice of appeal with the Superior Court of New Jersey, Appellate Division on January 21,

3. *R.* 7:6-1 *et seq.*
4. He was also sentenced under *N.J.S.A.* 39:4-86 (passing on a curve) to pay a fine of $10.00 plus the cost of the proceedings.
5. *N.J.S.A.* 2A:3-6. *See, State v. States*, 44 N.J. 285 (1965).
6. *R.* 3:23-1 *et seq.*

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1975. That court affirmed the denial by the county court of petitioner's motion for a jury trial. It held that a jury trial, in proceedings in which the offender upon conviction would receive a mandatory three months in the county jail and loss of driving privileges in the State of New Jersey for ten years, was not constitutionally mandated.[7]

Petitioner sought certification in the New Jersey Supreme Court, but this was denied on March 2, 1976. The instant petition for writ of certiorari to this Court followed.[8]

7. Citation to Appendix at 2a.

8. The imposition of that part of the sentence confining petitioner to county jail has been stayed throughout the pendency of the appellate proceedings. He currently remains on bail. Apparently, the license revocation was imposed.

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REASONS FOR GRANTING THE WRIT

In the State of New Jersey, all drinking-driving cases, whether they are first offenses or subsequent offenses, are heard before a magistrate in a local municipal court[9], and, if appealed, before the county court. Any second offender drinking-driver who is convicted, either in municipal court or on appeal by the county court, must suffer a mandatory penalty of three months imprisonment in county jail and the forfeiture of his right to operate a motor vehicle over the highways of the State for a period of ten years from the date of his conviction. *N.J.S.A.* 39:4-50(a). The courts have no discretion in the matter.[10] The question, therefore, in this case is whether a second offender drinking-driver, facing a mandatory term of imprisonment of three months and substantial loss of driving privileges, is entitled to a trial by jury under the Sixth Amendment to the Constitution as it has been applied through the Fourteenth Amendment. *Duncan v. Louisiana,* 391 U.S. 145 (1968).

Duncan v. Louisiana, recognized that the right to a jury trial in a serious criminal case was fundamental, which had to be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction.[11] *Duncan* embarked upon an analysis in which the severity of the authorized penalty was deemed the most relevant criteria in the determination of whether a particular charge was within the ambit of offenses for

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9. *N.J.S.A.* 2A:8-21(a).

10. The minimum fine for a first offender under the "a" section of the statute is $200.00. If the second offense occurs ten or more years after the first conviction, the municipal court does have the discretion to suspend the sentence of imprisonment. In that case, however, it can impose a fine of not less than $300.00 nor more than $1,000.00 and place the individual on probation. *N.J.S.A.* 39:4-50(a).

11. 391 U.S. at 149.

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which a jury trial was constitutionally required.[12] This Court subsequently held in *Baldwin v. New York*, 399 U.S. 66, 68 (1970) that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six month is authorized."

As this Court has most recently recognized, however, in dealing with the right to a jury trial in criminal contempt cases, the six month criterion of *Baldwin* is not exclusive. *Muniz v. Hoffman*, 95 S. Ct. 2178, 2190 (1975). In discussing a fine alone, the Court gave "no talismanic significance" to the definition of petty offenses found in 18 *U.S.C.* § 1(3). This Court found that it could not say that a fine of $10,000.00 imposed upon a labor union "was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake."[13] Thus, by so holding, this Court has shown the method of analysis that must be employed in determining whether a jury trial is mandated under the Sixth Amendment. The approach must be flexible; the problem must be faced from the standpoint of "determining the seriousness of the risk and the extent of the possible deprivation" faced by the individual.[14] Consequently, if the $500.00 maximum fine of 18 *U.S.C.* § 1(3) does not represent the boundary between a petty and serious crime, then the six month proscription of *Baldwin* is not and cannot be an exclusive prerequisite to the entitlement of a jury trial. This Court must embark, under the analysis of the cases, *see, e.g.*, *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Haynes*, 418 U.S. 488 (1974); *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1968); *Bloom v. United States*, 391 U.S. 194 (1968), upon an analysis directed at the severity of the penalty.[15]

12. *Id.* at 159-62.
13. 95 S.Ct. at 2191.
14. *Ibid.*
15. Justice Douglas recognized that under the Court's current formulation, the penalty is of controlling significance in determining whether an offense is "petty" or "serious." *Id.* at 2192 n.6 (Douglas, J. dissenting)

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New Jersey has enacted one of the strongest drinking-driving laws in the Nation. It imposes the most severe suspension penalties of any state for the offense of driving under the influence of alcohol.[16] Insofar as the statute pertains to petitioner, a second offender, the penalties are particularly harsh. The mandatory three month county jail sentence and ten year suspension of driving privileges stands in stark contrast to the treatment of subsequent offenders in other states, none of which impose fixed penalties in excess of three years.[17] In a recent case, the New Jersey Supreme Court candidly recognized that:

> License revocation proceedings do realistically effect drivers in a serious way, often threatening their ability to earn a livelihood, and it is settled that they must meet those incidents of fairness underlying due process. *In Re Arndt*, 67 N.J. 432, 436 (1975).

While New Jersey characterizes drinking-driving as a "petty offense," *State v. Macuk*, 57 N.J. 1, 10 (1970), its courts have mandated that a prosecution for drinking-driving must be so conducted as to respect and safeguard the basic rights normally accorded to one accused of a criminal offense. *State v. Lanish*, 103 N.J. Super. 441 (App. Div. 1968); *State v. Guerrido*, 60 N.J. Super. 505 (App. Div. 1960); *State v. Magai*, 96 N.J. Super. 109 (Essex Co. Ct. 1967); *State v. Ingram*, 67 N.J. Super. 21 (Passaic Co. Ct. 1961).

Previously, the state cases justified the failure to afford a jury trial by the rationale that the charge was not "an offense indictable at common law. . . ." *State v. Rogers*, 91 N.J.L. 212, 214 (E. & A. 1917). But, as has

16. *Report of the New Jersey Motor Vehicle Study Commission*, at 133, 135 (September, 1975).

17. Rutgers University Center for Alcohol Studies, "Comparative Legislative Report for the Alcohol Counter-measures Project," at p. 9 (1973).

been recognized by this Court, this method of analysis is no longer viable. *Baldwin v. New York*, 399 U.S. 66, 69-70 (1970). Clearly, New Jersey considers the drinking-driver to be a threat of first magnitude and has legislated accordingly. In today's society, the loss of driving privileges for an extended period of time cannot fairly be considered to be anything other than a consequence of considerable magnitude. This, coupled with a mandatory term of imprisonment, certainly places a burden even greater than that which would be imposed by a straight six month term of imprisonment.

The authorities in other jurisdictions are split on the question of whether a defendant is entitled to a trial by jury in a prosecution for driving while intoxicated. *See, Annot.* "Right to Trial by Jury in Criminal Prosecutions for Driving While Intoxicated or Similar Offiense," 16 A.L.R. 3d 1374 (1967). Those states that have granted the right have based their decisions not so much upon the incarceration that might be imposed, but rather upon a recognition that the inability to operate a motor vehicle upon the public highways places a tremendous imposition upon the individual. *See, e.g., Berberian v. Lussier*, 139 A.2d 869, 872 (R.I. 1958).[18]

Clearly, magistrates hearing many, many drinking-driving cases must become jaded to the defenses interposed. In a sense, this is a form of governmental oppression. The primary purpose of the jury is to prevent oppression by

18. Particularly apt is the case of *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 7, 410 P.2d 479 (1966) in which it was said:

> It must be accepted that under the present day conditions, driving an automobile while under the influence of an intoxicating liquor is an offense of a serious nature . . . . the power to imprison, fine, and suspend the right to use the public highways must be considered today as the ability to impose greater criminal sanctions not comparable to the petty crimes at common law which were tried summarily. In view of the foregoing considerations, we find the offense in question to be a serious crime which must be triable before a jury. . . .

the government and interpose between the accused and accuser the judgment of laymen who are less likely to function or appear as but another arm of the government.[19]

Baldwin v. New York,[20] expressly left open the question of whether other penalties, due to their serious nature, could nevertheless trigger the right to jury trial. In *Baldwin* it appeared that the six month imprisonment was only a "potential";[21] under *N.J.S.A.* 39:4-50(a) the three month jail sentence and ten year license revocation are mandatory. This case presents the Court with the opportunity to close that question left open in *Baldwin*. A defendant facing a trial for an offense that could result in the mandatory imposition of a three month jail sentence and ten year revocation of driving privileges should have a trial before a jury of his peers.

19. *Baldwin v. New York*, 399 U.S. at 72.
20. *Id.* at 68-69 n.6.
21. *Id.* at 72.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PERSKIE and CALLINAN,
A Professional Corporation,
Attorneys for Petitioner

/s/ Norman L. Zlotnick
NORMAN L. ZLOTNICK

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APPENDIX

ADDENDUM "A"

OPINION OF THE APPELLATE DIVISION

Argued November 3, 1975—Decided November 18, 1975.

Before Judges Allcorn, Kole and E. Gaulkin.

On appeal from Cape May County Court.

Mr. Willis F. Flower argued the cause for appellant (Messrs. Perskie and Callinan, P.A., attorneys).

Mr. Robert E. Rochford, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Mr. Joseph J. Rogers, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from his conviction by the county court, after a trial de novo on the record in the municipal court, of driving an automobile while under the influence of alcohol in violation of *N.J.S.A.* 39:4-50(a) and of passing on a curve, contrary to *N.J.S.A.* 39:4-86. The municipal and county courts imposed the same sentences. Since he was a second offender under *N.J.S.A.* 39:4-50(a), as required by that provision, defendant was sentenced to 3 months in the county jail and his driving privilege in the State was suspended for 10 years. A fine of $10, together with costs, was imposed for the violation of *N.J.S.A.* 39:4-86.

Defendant claims that the "verdict is against the weight of the evidence" and "it was error for the county court judge to substitute his opinion, judgment and discretion

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for that of the municipal magistrate on an issue which was uniquely concerned with the credibility of witnesses and the concomitant weight to be accorded their evidence." We have considered the record below in the light of *State v. Johnson*, 42 N.J. 146 (1964), which sets forth the standards for review by the county court and this court in this type of proceeding, as well as the legal principles to be applied. We are satisfied that there was sufficient evidence in the record as a whole to sustain the findings of guilt beyond a reasonable doubt and that there is no merit to the contention that the county court improperly failed to give due regard to the magistrate's assessment of the credibility of witnesses. There is no substance to the argument that the magistrate's statements that defendant might have been suffering from manic depression and that he could not determine how much alcohol defendant had imbibed are incompatible with the conclusion that defendant was guilty of drunken driving.

It is further claimed that the county court erred in denying defendant's motion for a jury trial. The mandated penalty for a second drunken driving offender is 3 months in the county jail and suspension of his driving privilege for 10 years. We recognize that suspension of the privilege to operate a motor vehicle may affect a substantial right requiring protection in accordance with incidents of due process and fundamental fairness. See *In the Matter of Albert H. Arndt*, 67 N.J. 432 (1975). Nevertheless, a jury trial in proceedings involving such suspension, even for the substantial period here involved, is not required. See *State v. Macuk*, 57 N.J. 1, 9-10 (1970); *State v. Owens*, 54 N.J. 153, *cert. den.* 396 U.S. 1021, 90 S. Ct. 593, 24 L.Ed.2d 514 (1970). Compare *Muniz v. Hoffman, Director, Region 20, National Labor Relations Board*, — U.S. —, 45 L.Ed.2d 319, 95 S. Ct. — (1975).

Defendant contends that the magistrate "committed prejudicial error by striking the expert defense medical testimony" and "by permitting a lay witness for the State to testify in an expert capacity regarding the physical disability of the defendant;" and committed plain error in "demanding that defendant produce his license and registration for inspection by the court in advance of the hearing," thereby becoming "apprised of the fact that defendant was on the revoked list." On the record before us, we find that none of these contentions has merit. See *State v. Macon*, 57 N.J. 325 (1971); *State v. Harper*, 128 N.J. Super. 270 (App. Div. 1974), certif. den. 65 N.J. 574 (1974); *State v. Hanson*, 59 N.J. Super. 434 (App. Div. 1960).

Affirmed.

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/s/ Elizabeth McLaughlin
Clerk

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ADDENDUM "B'

ORDER DENYING CERTIFICATION

(Filed March 2, 1976)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 2nd day of March, 1976.

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/s/ Florence R. Peskoe
Clerk

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ADDENDUM "C"

NOTICE OF MOTION FOR TRIAL BY JURY

(Filed July 11, 1974)

PLEASE TAKE NOTICE that on Friday, July 26, at the Cape May Court House, at 9:00 A.M., or at time of trial, whichever shall first occur, attorney for the defendant, Marshall G. Vance, will make application to the court for an Order granting the defendant a trial by jury. The proceeding before the court is a trial de novo on appeal of the defendant's conviction in the Lower Township Municipal Court on May 11, 1974, of a violation of NJS 39:4-50A (second offense) and 39:4-86.

TAKE FURTHER NOTICE that reliance will be placed upon defendant's brief which will be forwarded to the court forthwith.

/s/ Willis F. Flower
WILLIS F. FLOWER

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ADDENDUM "D"

ORDER OF COUNTY COURT

(Filed March 12, 1975)

This matter being opened to the Court by Willis F. Flower, Esquire, attorney for the defendant, Marshall Vance, in the presence of P. Martin Way, 3rd, Esquire, Assistant Prosecutor, and it appearing to the Court that the defendant has appealed from a conviction of N.J.S. 39:4-50(a) (driving while under the influence of alcohol) and N.J.S. 39:4-86 (passing on a curve) rendered by the Lower Township Municipal Court on May 11, 1974;

And the Court having tried the matter de novo utilizing the transcript of the Municipal Court proceeding and having considered the argument of counsel, it is on this 9th day of January, 1975, ORDERED AND ADJUDGED that the defendant be and hereby is found guilty of a violation of N.J.S. 39:4-50(a) and N.J.S. 39:4-86.

For the violation of N.J.S. 39:4-86 it is ORDERED that the defendant pay a penalty of $10.00 and $5.00 costs.

For the violation of N.J.S. 39:4-50(a) the defendant is found guilty as a second offender within the meaning of the Statute and is sentenced to three months in the County Jail and his driving license in the State of New Jersey is ORDERED revoked for a period of ten years.

IT IS FURTHER ORDERED and ADJUDGED that imposition of sentence be and hereby is stayed pending appeal.

/s/ Nathan C. Staller
NATHAN C. STALLER, J.C.C.

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ADDENDUM "E"

ORAL ORDER DENYING MOTION FOR TRIAL BY JURY

(Commencing at 8-14)

THE COURT: Well, as to the matter of a trial of this action or this issue by a jury, it is quite clear and it has been clear for many, many years that the Court recognizes motor vehicle offenses and drunken driving offenses particularly as not in that category where a jury trial should be had, notwithstanding the fact that there is on the second offense a mandatory penalty of imprisonment.

This view is supported in Porter, 102 N. J. Law 71, and State vs. Rogers, 91 N.J. Law, 212; and this has also been affirmed or reaffirmed, (9) the right to a trial by jury not extending itself to cases of this nature.

If there is to be a change in this area of the law I do not feel that this Court should pioneer that change; and that it is a matter for the Supreme Court or for the legislature.

The motion for a jury trial is denied.

* * *

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